U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 10 August 2005

Case No. 2003-BLA-118

In the Matter of

CLYDE GABBARD,

Claimant,

v.

MOUNTAIN CLAY, INC.,

Employer,

and

LIBERTY MUTUAL INSURANCE CO.,

Carrier,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,

Party-in-Interest.

BEFORE: DANIEL J. ROKETENETZ
Administrative Law Judge

DECISION AND ORDER - AWARD OF BENEFITS

This case arises from a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1977 ("Act"), 30 U.S.C. § 901 et seq., and the regulations issued thereunder, located in Title 20 of the Code of Federal Regulations. Regulation section numbers mentioned in this Decision and Order refer to sections of that Title.

On February 21, 2003, this case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs. (DX 114).[1] The parties requested a Decision and Order on the record, and in an Order issued April 26, 2004, I granted the request. All parties were afforded full opportunity to present evidence as provided in the Act and the regulations issued thereunder. The opinion which follows is based on all relevant evidence of record.

ISSUES

The issues in this case are:

1. Whether the claim was timely filed;

2. Whether the Claimant is a miner;

3. Whether the Claimant was employed in the mining industry post-1969;

4. The length of coal mine employment;

5. Whether the Claimant has one dependent for the purposes of benefit argumentation;

6. Whether the named Employer is the responsible operator;

7. Whether the named Carrier is the correct insurer;

8. Whether the Claimant has pneumoconiosis as defined in the Act and regulations;

9. Whether the Claimant's pneumoconiosis arose out of coal mine employment;

10. Whether the Claimant is totally disabled; and,

[1] In this Decision and Order, "DX" refers to the Director's exhibits, "CX" refers to the Claimant's exhibits, "EX" refers to the Employer's exhibits, and "TR" refers to the transcript of the hearing.

11. Whether the Claimant's disability is due to pneumoconiosis.

(DX 94).

Based upon a thorough analysis of the entire record in this case, with due consideration accorded to the arguments of the parties, applicable statutory provisions, regulations, and relevant case law, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Background:

The Claimant, Clyde Gabbard, was born April 10, 1924 and has an eighth grade education. (DX 1). He alleges one dependent for the purposes of benefit augmentation, namely his wife, Rena. Id. In his application for benefits, he stated that he worked twenty years in underground coal mine employment, ceasing work in 1973 due to health problems. Id.

Procedural History:

The Claimant filed his first application for benefits on January 18, 1974. (DX 27). The claim was initially denied by the District Director on September 16, 1974, and after a review of additional evidence, again on March 7, 1977. Id. The Claimant requested an informal hearing, and the District Director awarded benefits. Id. The Employer sought appeal to an administrative law judge, and twice the case was remanded to the District Director for a determination of the proper insurance carrier. Id. After ultimately identifying Argonaut Insurance Company as the correct carrier, the District Director awarded benefits. Id. The Employer requested a formal hearing, and the case was transferred to Administrative Law Judge Charles W. Campbell. Id. He denied benefits on July 30, 1989. (DX 27). The Employer appealed to the Benefits Review Board ("Board") who affirmed Judge Campbell's decision on January 13, 1993. Id.

The Claimant filed his second application for benefits on July 15, 1993 which the District Director treated as a request for modification. (DX 27). On September 1, 1993, the District Director issued a denial of benefits. Id. The parties did not request a formal hearing pursuant to § 725.419(d), and the case was administratively closed. Id.

The Claimant filed his third claim for benefits on January 10, 1995. (DX 1). The District Director denied benefits on April 29, 1996, and the Claimant requested a formal hearing. (DX 12). Administrative Law Judge Paul H. Teitler, on October 9, 1997, found a material change in condition since the Claimant's previous case, and he awarded benefits. (DX 42). After Judge Teitler denied the Employer's request for reconsideration and remand, the Employer sought appeal to the Board. (DX 43-44, 47, 52). Subsequently the District Director filed a motion with the Board requesting the Employer's appeal be dismissed as premature. (DX 60). The Board granted the District Director's motion and remanded the case to Judge Teitler for determination of the insurance carrier. (DX 62). Before the case could be transferred to an administrative law judge, the Employer filed a motion to remand the case to the District Director for an additional insurance carrier to be named as a party. (DX 60). The case was assigned to Judge Robert L. Hillyard; however, he issued an Order stating jurisdiction remained with Judge Teitler to decide the motion for remand. (DX 67).

On June 30, 1999, Judge Teitler remanded the claim to the District Director to determine the correct insurance carrier. (DX 70). The District Director named Interstate Coal Company, Inc., d/b/a Mountain Clay, Inc., as the potential responsible operator in three separate capacities.[2] Id. Liberty Mutual Insurance Group and Argonaut Insurance Company were named the potential insurance carriers, based upon the date of the Claimant's last coal mine employment. Id. All named parties disputed this determination, and the claim was forwarded to the Office of Administrative Law Judges.

I received this case and issued a Decision and Order on July 18, 2001. (DX 94). After a thorough analysis, I determined that Liberty Mutual Insurance Group was the proper insurance carrier in this claim. Id. Also, I adopted Judge Teitler's medical findings to award the Claimant benefits. Id. The Employer immediately appealed to the Board. (DX 95). While the case was pending before the Board, the Employer filed a motion for remand for modification proceedings. (DX 110). On July 24, 2002, the Board granted the Employer's request and remanded the

[2] Interstate Coal Co., d/b/a Mountain Clay Inc., as insured by Liberty Mutual, was named as the primary responsible operator. (DX 70). Interstate Coal Co., d/b/a Mountain Clay Inc., as self-insured was named as secondary responsible operator, and Interstate Coal Co., d/b/a Mountain Clay Inc., as insured by Argonaut Insurance, was named as the tertiary operator. Id.

case to the District Director. (DX 113). However, the Board held that if an administrative law judge denied modification, then at that time, the Board would consider the two appeals jointly. Id.

The District Director determined that the Employer had failed to establish a mistake in determination of fact, and thus, granted benefits on October 11, 2002. (DX 115). This matter was transferred to this office after the Employer submitted a request for a formal hearing. (DX 116). A number of motions have been filed in this claim. All have been previously decided, and there are no outstanding requests. Accordingly, this claim is ripe for a decision.

Coal Mine Employment:

In my prior Decision and Order, I found that the Claimant had established twenty years of coal mine employment. (DX 94). The Claimant has not had any subsequent coal mine employment, and therefore, the issues of length of coal mine employment cannot be reconsidered in this modification of a duplicate claim. See Sellards v. Director, OWCP, 17 B.L.R. 1-77 (1993). The Claimant's Social Security earnings reports showed that he last worked in the Nation's coal mines in 1973. (DX 27). Accordingly, I find the Claimant is a miner, and he had post-1969 coal mine employment.

Dependency:

The Claimant alleges one dependent for the purposes of benefit augmentation, namely his wife, Rena. (DX 1). They were married on December 4, 1951. (DX 1, 27). Therefore, I find that the Claimant has one dependent for the purposes of benefit augmentation.

Timeliness:

Under section 725.308(a), a claim of a living miner is timely if it is filed within three years after a medical determination of total disability due to pneumoconiosis has been communicated to the miner. Section 725.308(c) creates a rebuttable presumption that every claim for benefits is timely filed. The record contains no supporting evidence that establishes a diagnosis of total disability due to pneumoconiosis was ever communicated to the Claimant. Therefore, I find the Employer did not rebut this presumption, and this claim was timely filed.

Responsible Operator and Carrier:

After a detailed review of my previous Decision and Order dated July 23, 2001, I adopt my findings therein naming Interstate Coal Company, d/b/a Mountain Clay, Inc., as the responsible operator as insured by Liberty Mutual Insurance Company. (DX 94).

Applicable Regulations:

Because this claim was filed after March 31, 1980, the effective date of Part 718, it must be adjudicated under those regulations. Amendments to the Part 718 regulations became effective on January 19, 2001. Section 718.2 provides that the provisions of Section 718 shall, to the extent appropriate, be construed together in the adjudication of all claims.

Modification of a Duplicate Claim:

In cases where a claimant files more than one claim and the earlier claim is denied, the later claim must also be denied on the grounds of the earlier denial unless there has been a material change in condition or the later claim is a request for modification. Section 725.309(d). The Claimant filed his second claim, a request for modification, that resulted in denial by the District Director in 1993. The Claimant did not appeal and that denial became final. On January 10, 1995, the Claimant filed the current claim for benefits which was remanded by the Board in July 2002 for modification proceedings. The District Director awarded benefits and the Employer requested a formal hearing. Accordingly, this matter is before the undersigned on a request for modification of a duplicate claim.

Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 922, as incorporated into the Black Lung Benefits Act by 30 U.S.C. § 932(a) and as implemented by 20 C.F.R. § 725.310, provide that upon a miner's own initiative, or upon the request of any party on the ground of a change in conditions or because of a mistake in a determination of fact, the fact-finder may, at any time prior to one year after the date of the last payment of benefits or any time before one year after the denial of a claim, reconsider the terms of an award or a denial of benefits. § 725.310(a).

In deciding whether a mistake in fact has occurred, the United States Supreme Court stated that the administrative law judge has "broad discretion to correct mistakes of fact, whether

demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." O'Keefe v. Aerojet-General Shipyards, Inc., 404 U.S. 254, 256 (1971).

In determining whether a change in condition has occurred requiring modification of the prior denial, the Board has similarly stated that:

> [T]he administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish at least one element of entitlement which defeated entitlement in the prior decision.

Kingery v. Hunt Branch Coal Co., 19 B.L.R. 1-6 (1994).

Furthermore,

> [I]f the newly submitted evidence is sufficient to establish modification ..., the administrative law judge must consider all of the evidence of record to determine whether the Claimant has established entitlement to benefits on the merits of the claim.

Kovac v. BCNR Mining Corp., 14 B.L.R. 1-156 (1990). Modified on recon., 16 B.L.R. 1-71 (1992).

The record will be evaluated under Section 725.310. In evaluating a request for modification under Section 725.310, it is not enough that the administrative law judge conduct a substantial evidence review of the district director's finding. Rather, the claimant is entitled to de novo consideration of the issue. Kovac v. BCNR Mining Corp., 14 B.L.R. 1-156 (1990), aff'd on recon., 16 B.L.R. 1-71 (1992); Dingess v. Director, OWCP, 12 B.L.R. 1-141 (1989); Cooper v. Director, OWCP, 11 B.L.R. 1-95 (1988). See also 20 C.F.R. § 725.310(c). Thus, my review of the record is de novo in order to determine if the Claimant is entitled to benefits under the Act.

At the outset, I note that the Claimant has previously been awarded benefits after establishing pneumoconiosis, total

disability, and total disability due to pneumoconiosis. The disease associated with a black lung claim, pneumoconiosis, is a progressive and irreversible disease. Peabody Coal Co. v. Odom, 342 F.3d 486, 491 (6th Cir. 2003) (holding pneumoconiosis is a progressive and latent disease which "can arise and progress even in the absence of continued exposure to coal dust"); Stewart v. Wampler Brothers Coal Co., 22 B.L.R. 1-80, 1-89 (2000) (en banc) (reaffirming that pneumoconiosis is a progressive and latent disease). Because pneumoconiosis is irreversible, an employer or responsible operator cannot base a request for modification on a material change in physical condition, as the miner cannot suddenly recover from an irreversible disease. See 20 C.F.R. § 725.310 (2000) and (2001). Furthermore after a comprehensive examination, I find no material change in conditions in the remainder of the issues in this claim. Therefore, I will examine the record for a mistake in fact.

Pneumoconiosis:

Section 718.202(a) sets forth four alternate methods for determining the existence of pneumoconiosis. Pursuant to Section 718.202, the Miner can demonstrate pneumoconiosis by means of 1) x-rays interpreted as positive for the disease, or 2) biopsy or autopsy evidence, or 3) the presumptions described in Sections 718.304, 718.305, or 718.306, if found to be applicable, or 4) a reasoned medical opinion which concludes the presence of the disease, if the opinion is based on objective medical evidence such as pulmonary function studies, arterial blood gas tests, physical examinations, and medical and work histories.

Under Section 718.202(a)(1), a finding of the presence of pneumoconiosis may be based upon a chest x-ray conducted and classified in accordance with Section 718.102. To establish the existence of pneumoconiosis, a chest x-ray must be classified as category 1, 2, 3, A, B, or C, according to the ILO-U/C classification system. A chest x-ray classified as category 0, including subcategories 0/1, 0/0, or 0/-, does not constitute evidence of pneumoconiosis.

Two x-ray readings were offered into the record. The x-ray dated January 10, 2004 was interpreted as positive for

pneumoconiosis with a 1/0 profusion by Dr. Baker, who is a B-reader.[3] (CX 1). As such, I find this x-ray to be positive.

In an October 3, 2003 report, Dr. Jarboe, a B-reader, interpreted an April 30, 1997 x-ray as negative for pneumoconiosis. (EX 1).[4] However, this x-ray was previously determined unreadable by Drs. Shipley and Spitz, both B-readers. (DX 38, 39). Also, Dr. Baker, a B-reader, had interpreted the x-ray as positive for pneumoconiosis with a 1/0 profusion. (DX 34). Accordingly, I find this x-ray stands in equipoise.

Therefore, in examining the newly offered evidence in conjunction with the prior Decisions and Orders from Judge Teitler and myself, I find that there is no mistake in fact. The evidence of record supports a finding of pneumoconiosis under Section 718.202(a)(1).

Total Disability:

Total disability is defined as the miner's inability, due to a pulmonary or respiratory impairment, to perform his usual coal mine work or engage in comparable gainful work in the immediate area of the miner's residence. § 718.204(b). Total disability can be established pursuant to one of the four standards in Section 718.204(b)(2) or the irrebuttable presumption of Section 718.304, which is incorporated into Section 718.204(b). The presumption is not invoked here because there is no x-ray evidence of large opacities classified as category A, B, or C, and no biopsy or equivalent evidence.

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[3] A B-reader is a physician who has demonstrated proficiency in assessing and classifying x-ray evidence of pneumoconiosis by successful completion of an examination conducted by or on behalf of the United States Department of Health and Human Services. 42 C.F.R. § 37.51. The qualifications of physicians are a matter of public record at the National Institute for Occupational Safety and Health reviewing facility at Morgantown, West Virginia. Because B-readers are deemed to have more training and greater expertise in the area of x-ray interpretation for pneumoconiosis, their findings may be given more weight than those of other physicians. Taylor v. Director, OWCP, 9 BLR 1-22 (1986).

[4] Pursuant to Orders that I issued on June 24, 2005 and July 13, 2005, the Employer's medical report from Dr. Dahhan dated April 2, 2005 was struck from the record as untimely.

Where the presumption does not apply, a miner shall be considered totally disabled if he meets the criteria set forth in Section 718.204(b)(2), in the absence of contrary probative evidence. The Board has held that under Section 718.204(c), the precursor to § 718.204(b)(2), that all relevant probative evidence, both like and unlike, must be weighed together, regardless of the category or type, to determine whether a miner is totally disabled. Shedlock v. Bethlehem Mines Corp., 9 BLR 1-195, 1-198 (1986); Rafferty v. Jones & Laughlin Steel Corp., 9 BLR 1-231, 1-232 (1987). Furthermore, the Claimant must establish this element by a preponderance of the evidence. Gee v. W.G. Moore & Sons, 9 BLR 1-4, 1-6 (1986).

Subsection (b)(2)(i) of § 718.204 provides for a finding of total disability where pulmonary function tests demonstrate FEV_1[5] values less than or equal to the values specified in the Appendix to Part 718 and such tests reveal FVC[6] or MVV[7] values equal to or less than the applicable table values. Alternatively, a qualifying FEV_1 reading together with an FEV_1/FVC ratio of 55% or less may be sufficient to prove disabling respiratory impairment under this subsection of the regulations. § 718.204(b)(2) and Appendix B.

Subsection (b)(2)(i) of § 718.204 provides for a finding of total disability where pulmonary function tests demonstrate FEV_1[8] values less than or equal to the values specified in the Appendix to Part 718 and such tests reveal FVC[9] or MVV[10] values equal to or less than the applicable table values. Alternatively, a qualifying FEV_1 reading together with an FEV_1/FVC ratio of 55% or less may be sufficient to prove disabling respiratory impairment under this subsection of the regulations. § 718.204(b)(2) and Appendix B. The record consists of one newly offered pulmonary function study. (CX 1). The study conducted by Dr. Baker produced qualifying values under the

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[5] Forced expiratory volume in one second.

[6] Forced vital capacity.

[7] Maximum voluntary ventilation.

[8] Forced expiratory volume in one second.

[9] Forced vital capacity.

[10] Maximum voluntary ventilation.

regulations.[11] Thus, I find the pulmonary function study evidence of record supports a finding of total disability under subsection (b)(2)(i).

Section 718.204(b)(2)(ii) provides for the establishment of total disability through the results of arterial blood gas tests. Blood gas tests may establish total disability where the results demonstrate a disproportionate ratio of pCO_2 to pO_2, which indicates the presence of a totally disabling impairment in the transfer of oxygen from the Claimant's lung alveoli to his blood. § 718.204(c)(2) and Appendix C. The test results must meet or fall below the table values set forth in Appendix C following Section 718 of the regulations. One study was entered into the record. (CX 1). The study conducted by Dr. Baker yielded non-qualifying values under the regulatory standards for disability. As such, the blood gas study evidence of record does not support total disability under subsection (b)(2)(ii).

Total disability under Section 718.204(b)(2)(iii) is inapplicable because the Claimant failed to present evidence of cor pulmonale with right-sided congestive heart failure.

Where total disability cannot be established under subparagraphs (b)(2)(i), (b)(2)(ii) or (b)(2)(iii), Section 718.204(b)(2)(iv) provides that total disability may nevertheless be found if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents the miner from engaging in his usual coal mine work or comparable gainful work. A reasoned medical opinion is one which contains underlying documentation adequate to support the physician's conclusions. Field v. Island Creek Coal Co., 10 BLR 1-19, 1-22 (1987). Proper documentation exists where the physician sets forth the clinical findings, observations, facts and other data on which he bases his diagnosis. Id.

[11] I extrapolated the values at Appendix B in the Regulations for FEV_1 and FVC results for the Claimant's correct age pursuant to Hubbell v. Peabody Coal Co., B.R.B No. 96-2333 BLA (Dec. 20, 1996)(unpub.) and Fraley v. Peter Cave Coal Mining Co., B.R.B. No. 99-1279 BLA (Nov. 24, 2000)(unpub.). For an individual who is seventy-eight years old and 65.4 inches tall, the FEV_1 value is 1.39 and the FVC value is 1.84.

Dr. Baker diagnosed the Claimant with a moderate pulmonary impairment due to pneumoconiosis. (CX 1). Also, he stated that the Claimant could not perform his prior coal mine employment. Dr. Baker specifically relied on the Claimant's qualifying pulmonary function study with FEV_1 being less than sixty percent of predicted. I find his report well-reasoned and well-documented regarding total disability.

In a consultative review dated September 8, 2003, Dr. Tuteur, Board-certified in Internal Medicine and Pulmonary Diseases, examined six sets of hospital records, sixty x-rays interpreted by thirty readers, seven physicians' letters regarding the Claimant's condition, twenty medical reports and corresponding medical testing, two doctors' depositions, six pulmonary function tests, and three arterial blood gas analysis. (EX 2). Dr. Tuteur opined that the Claimant "does not have any persistent respiratory impairment though at times, secondary to his cardiac disease, impairment of gas exchange is documented only to revert back to normal with treatment. He is totally and permanently disabled from returning to work in the coal mines or work requiring similar effort..." Dr. Tuteur then determined that the Claimant's disability is not due to pneumoconiosis or any coal mine dust related health problem, but instead relates to "severe and advanced coronary artery disease complicated by obesity, diabetes mellitus, stroke, and occasional elevated high blood pressure...."

Dr. Jarboe, Board-certified in Internal Medicine and Pulmonary Diseases, conducted a consultative review on September 10, 2003. (EX 1). He examined six letters from physicians regarding the Claimant's condition, seven sets of hospital treatment records, two doctors' depositions, twenty medical reports and corresponding medical testing, seventeen x-rays, two arterial blood gas analyses, and one pulmonary function study. Dr. Jarboe diagnosed the Claimant as totally disabled from a respiratory standpoint. Although he questioned the validity of the two most recent pulmonary function studies, Dr. Jarboe found both tests supportive of his determination. However, he opined that the Claimant's disability was not caused by or substantially contributed to by coal dust or pneumoconiosis. Dr. Jarboe attributed the disability to the Claimant's obesity, severe coronary artery disease, and chemotherapy for carcinoma of the colon. In sum, I find his report well-reasoned and well-documented.

The Board has held that a reasoned medical opinion is one which contains underlying documentation adequate to support the

physician's conclusions. Field v. Island Creek Coal Co., 10 BLR 1-19, 1-22 (1987). Furthermore, the Board has stated that a report may be given little weight where it is internally inconsistent and inadequately reasoned. See Mabe v. Bishop Coal Co., 9 B.L.R. 1-67 (1986). Dr. Tuteur initially stated that the Claimant had no respiratory impairment; however, he noted an impairment of gas exchange. (EX 2). Subsequently in his report, Dr. Tuteur opined that the Claimant was totally disabled from returning to his work in the coal mine industry. He listed numerous health problems that contributed to the Claimant's condition, some of which affect the respiratory system. Dr. Tuteur failed to explain why he was able to opine the Claimant was totally disabled but had no respiratory impairment. I find the statements in his report inconsistent and unreasoned. As such, I grant his report less weight.

Accordingly, the newly offered medical report evidence is supportive of total disability under Section 718.204(b)(2)(iv). I rely on the well-reasoned and well-documented medical reports of Drs. Baker and Jarboe and the qualifying pulmonary function study in conjunction with the prior Decisions and Orders from Judge Teitler and myself to find that there is no mistake in fact. The evidence of record supports a finding of total disability under Section 718.204.

Total Disability Due to Pneumoconiosis:

The Claimant must establish that his total disability is due to pneumoconiosis pursuant to § 718.204(c)(1). Total disability due to pneumoconiosis requires that pneumoconiosis, as defined in § 718.201, be a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Substantially contributing cause is defined as having a material adverse effect on the miner's respiratory or pulmonary condition or as materially worsen[ing] a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment. § 718.204(c)(1)(i) and (ii). Absent a showing of cor pulmonale or that one of the presumptions of § 718.305 are satisfied, it is not enough that a miner suffer from a disabling pulmonary or respiratory condition to establish that this condition was due to pneumoconiosis. See § 718.204(c)(2). No evidence of cor pulmonale or evidence satisfying the presumptions of § 718.305 has been offered. Therefore, total disability due to pneumoconiosis must be demonstrated by documented and reasoned medical reports. Id. In interpreting this requirement, the Sixth Circuit has stated that pneumoconiosis must be more than a de

minimus or infinitesimal contribution to the miner's total disability. Peabody Coal Co. v. Smith, 12 F.3d 504, 506-507 (6th Cir. 1997).

Moreover, the Board has held that it is proper to accord less weight to physicians' opinions, which found that pneumoconiosis did not contribute to the miner's disability, on grounds that the physicians did not diagnose pneumoconiosis. Osborne v. Clinchfield Coal Co., BRB No. 96-1523 BLA (Apr. 30, 1998).[12] Neither Dr. Teteur nor Dr. Jarboe opined that the Claimant suffered from pneumoconiosis. Thus, I afford their opinions, stating that the Claimant's totally disabling respiratory impairment did not arise from coal dust exposure, less weight.

In sum, that leaves the well-reasoned and well-documented opinion of Dr. Baker who opined the Claimant's pulmonary impairment resulted from coal dust exposure and cigarette smoke. Dr. Baker relied on a positive x-ray for pneumoconiosis, qualifying pulmonary function tests, and symptomatology that would preclude the Claimant from returning to coal mine work. He also recorded twenty plus years of coal mine employment and a previous smoking history of ten pack-years with the Claimant quitting in 1973. In relying on Dr. Baker's report, I find that the newly offered medical evidence is supportive of a determination of total disability due to pneumoconiosis. On examination of the prior Decisions and Orders from Judge Teitler and myself, I find that there is no mistake in fact.

Entitlement:

As the Employer has failed to establish a material change in condition or a mistake in fact, the Claimant is entitled to benefits under the Act.

Attorney's Fees:

No award of attorney's fees for service to the Claimant is made herein because no application has been received from counsel. A period of 30 days is hereby allowed for the Claimant's counsel to submit an application. Bankes v. Director, 8 BLR 2-1 (1985). The application must conform to 20 C.F.R. § 725.365 and 725.366, which set forth the criteria on which the

[12] For persuasive support, see also Amax Coal Co. v. Director OWCP [Chubb], 312 F.3d 882 (7th Cir. 2002); Soubik v. Director, OWCP, 366 F.3d 226 (3th Cir. 2004).

request will be considered. The application must be accompanied by a service sheet showing that service has been made upon all parties, including the Claimant and Solicitor as counsel for the Director. Parties so served shall have 10 days following receipt of any such application within which to file their objections. Counsel is forbidden by law to charge the Claimant any fee in the absence of the approval of such application.

ORDER

It is HEREBY ORDERED that

1. The claim for benefits of CLYDE GABBARD under the Act is hereby GRANTED;

2. Interstate Coal Co., d/b/a Mountain Clay, Inc., as insured by Liberty Mutual Insurance Co., shall pay Clyde Gabbard all benefits to which he is entitled to under the Act;

3. Interstate Coal Co., d/b/a Mountain Clay, Inc., as insured by Liberty Mutual Insurance Co., shall refund to the Black Lung Disability Trust Fund all benefits, plus interest, if previously paid on behalf of Clyde Gabbard; and,

4. Interstate Coal Co., d/b/a Mountain Clay, Inc., as insured by Liberty Mutual Insurance Co., shall pay the Claimant's attorney, Hugh M. Richards, fees and expenses to be established in a supplemental decision and order.

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DANIEL J. ROKETENETZ
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 days from the date of this decision, by filing a notice of appeal with the Benefits Review Board at P.O. Box 37601, Washington, D.C. 20013-7601. A copy of a notice of appeal must also be served on Donald S. Shire, Esquire, Associate Solicitor for Black Lung Benefits, Frances

Perkins Building, Room N-2117, 200 Constitution Avenue, NW, Washington, D.C. 20210.